

(REPS)

From: Dorian@melbourne.catholic.org.au
Sent: Monday, 2 February 2004 4:38 PM
To: Committee, Treaties (REPS)
Subject: Submission on Op Protocol on CAT

OPCAT
Submission No:12.....



submission on the
Op pro 2 CAT...

Dear Secretary,

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By Gillian Gordon

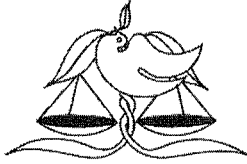
Please find attached the submission from the Catholic Commission for Justice, Development and Peace about the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Thanks to Ms Wilson for her extension until today, Monday 2. All the best with your work on this Inquiry.

Regards

(See attached file: submission on the Op pro 2 CAT.doc)

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CATHOLIC COMMISSION FOR
**JUSTICE,
DEVELOPMENT
& PEACE**
MELBOURNE

**Submission to the Joint Standing Committee
on Treaties regarding the Optional Protocol to
the Convention Against Torture and other
Cruel, Inhuman or Degrading treatment or
Punishment**

January 2004

The Catholic Commission for Justice, Development and Peace (CCJPD) welcomes the opportunity to make this submission to the Joint Standing Committee on Treaties (hereon referred to as the 'Committee') regarding the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading treatment or Punishment (hereon referred to as 'the Protocol')

Catholic Social Teaching on Human Rights

Catholic social teaching has a strong regard for human rights, considering them indispensable to the dignity of the human person. Human Rights are an integral and evolving part of 'Catholic Social Teaching'. Pope John XXIII of Vatican II Council fame was the Vatican's ambassador (*papal nuncio*) at the Paris sessions of the early Commission on Human Rights in 1947-8. His admiration of the human rights contained in the Declaration was recognised in his 1961 Papal Encyclical *Pacem in Terris* (*Peace on Earth*) which stressed the importance of human rights.¹

More recently, Pope John Paul II has voiced his concern about States having "contempt for the fundamental human rights of so many people, especially children..."²

The Church challenges us to apply human rights to people who are not citizens too:

*Working for the unity of the human family means being committed to the rejection of all discrimination based on race, culture or religion as contrary to God's plan. It means bearing witness to a fraternal life based on the Gospel, which represents cultural difference and is open to sincere and trustful dialogue. It includes the advancement of everyone's rights to be able to live peacefully in their own country, as well as attentive concern that in every State, immigration laws be based on recognition of fundamental human rights.*³

¹ Mary Ann Glendon, 'Human Rights for All: Australia's Contributions to the International Human Rights Project' Caritas Australia, Helder Camera lecture 2002.

² John Paul II *Novo Millennio Ineunte: At the Beginning of the New Millennium*, Strathfield, 2001, p.68.

³ John Paul II, Message for World Migration Day, November 1999.

About the CCJDP

The CCJDP aims to help educate and give leadership to the Catholic and wider community in the gospel message of justice and in the social teachings of the Church. The Commission's Charter requires it to work for justice in public, local and national structures. It seeks to achieve these ends through research, analysis, working with parish networks, public forums, in schools and in the media. It actively seeks to explore ways that social justice can be improved in society and in the performance of mechanisms that have a role in public life. The CCJDP has raised the issue of violations of human rights in a variety of fora including the media, the lobbying of parliamentarians and producing documents.

The CCJDP monitors developments regarding the human rights of asylum seekers via the Australian Human Rights Register established in 1997. The Register records entries from non-governmental organisations and the media about development on human rights. A need to do this was identified at by community groups at the National Conference of Community Legal Centres in 1997. The purpose of the Register was to monitor our Governments' (State and Federal) compliance with human rights standards and to raise community awareness and understanding about human rights. In doing so, it aims to play a small part in fulfilling a purpose of the Universal Declaration of Human Rights which aims:

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The 2003 Australian Human Rights Register documents over 300 reports covering both positive and negative developments in the respect for the human rights of people in Australia.

Copies of the Australian Human Rights Register have been sent as an appendix to members of the Committee.

The Optional Protocol

The CCJDP recommends that the Optional protocol be ratified and incorporated into domestic legislation without reservation.

Australia has ratified the Convention against Torture in 1989 and already takes into consideration some of its provisions, in certain instances, when assessing refugee claims; so it should not be adverse to incorporating the Optional Protocol into domestic law.

The underlying principles of the Protocol are:

1. to ensure that no person deprived of liberty should be subjected to ill treatment under any circumstances.
2. All forms of ill-treatment run contrary to the principles of civilised conduct, and
3. Ill-treatment not only damages the victim but also degrades the official who inflicts or authorises it.

The emphasis of the Protocol is on prevention through monitoring, education and protection.

However, in an unprecedented move on July 24 2002, Australia voted against the adoption of the text of a protocol designed to strengthen the 1984 United Nations Convention against Torture in the UN's Economic and Social Council (ECOSOC). Australia, China, Cuba, Egypt, Japan, Libya, Nigeria and the Sudan cast the negative votes. It was highly disappointing and retrograde step that Australia opposed the text of the Protocol. It is counterproductive to Australia's commitment to the international human rights system.

If the concern for this action was that Australia was sacrificing a modicum of its sovereignty to an international body that can only provide cautionary and advisory reports at a UN level, then what can we say of the massive amount of sovereignty willingly conceded under the WTO arbitration system or the proposed Australia US Free trade Agreement, which could, if it followed the North American example, see private companies suing our Government?

Given these precedents in the trading sphere, and Australia's 54-year-old history of building international human rights building, any nervousness must be seen as being based on misunderstanding, or, more worryingly, a sense of shame and a desire to cover up possible human rights violations occurring in Australia. Could this be the case?

The thrust of the protocol is to allow inspection of detention facilities. There are reported cases of individuals in Australia having suffered human rights violations, and national mechanisms have failed to alleviate their situation. For example, the Daily Telegraph reported on Australia Day 2004, that a 13-year-old boy with a record of suicide attempts had remained in Baxter Immigration Detention Centre, despite 20 Child protection notifications made by the South Australian Government's Family and Youth Services recommending that he be immediately removed from the detention environment. The recommendations had been ignored by the Department of Immigration over a two and a half year period, despite a leaked Department of Immigration memo stating "psychiatric advice suggests that this environment is contributing to the deteriorating mental health status of the family, a move to a form of community detention for all three members is vital to allow a comprehensive assessment to occur.'

This case illustrates two things:

1. There is a serious breakdown of an ethical and effective protection of vulnerable people held in detention, under the care of the Department of Immigration.
2. *Prima facie* evidence indicates that this child's human rights have been violated in detention by Government.

Sadly the case is not an isolated one in immigration detention. There need for protection of human rights is vital in Australia.

Reasons for Ratification

According to Article 1 of the Optional Protocol of the Convention Against Torture, the objective is to:

"...establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."

We urge the Committee to support this objective for the following reasons.

1. Australia should have the best possible national system for protecting human rights. It is very important that nobody should ever be tortured in Australia. A national mechanism that can help ensure that such a possibility of someone being tortured is slight or negligible. If an effective national mechanism is in place, Australia should have nothing to fear of an international oversight mechanism by a special body that can visit places of detention. Such visits by the Working Group on Arbitrary Detention and the Special Envoy of the UN Human Rights Commissioner occurred in 2002, without the sky falling in, and some very sensible and much needed reforms being proposed for consideration by these UN bodies. If these proposals had been listened too, instead of being summarily dismissed by the Government, the case of the suicidal teenager held in detention might have been avoided.
2. The Human Rights and Equal Opportunity Commission is an appropriate body to be able to visit and investigate places of detention. An amendment to the HREOC act to incorporate Article 3 of the Protocol and concomitant funding to appoint allow the Commission to operate effectively in this area.
3. Incorporation of Article 4 of the Protocol into domestic law to allow international scrutiny should be seen as highly desirable for a country that seeks to champion human rights. Allowing international scrutiny is a measure of our commitment to being accountable to the human rights principles contained in the Convention against Torture. Supporting the protocol sends the right signal to countries in our region about the importance we place on countries coming on board to the international system of human rights protection. Our Governments have agreed to respect human rights, and even if they dishonour them on the basis that they are not incorporated into domestic law, they remain a standard and a written agreement international law, which obliges the Government to act honourably. They are a tool of accountability, which has the power to shame Governments into action or reform to protect peoples' well being. Australia should be the last to shy away from this.

Nationalism vs Universalism

When Eleanor Roosevelt, the first chair of the Human Rights Commission, and other delegates, including Australia's, drafted the Universal Declaration of Human Rights in 1948, they were circumspect about how far this great statement of principles would go in tempering governments' ability to violate and disregard their citizens' rights. Ever since Nazi Germany and the Soviet Union, Governments have liked to invoke the 'national interest' and domestic law as a paramount reason for ignoring or violating universal human rights. The US is the most recent offender in this regard. But if all nations abandon the UN human rights treaty system in preference to their domestic law, violations will be rampant and the law of the jungle will reign internationally.

The Department of Foreign Affairs and Trade reinforced this point when it stated that Australia has a strong interest in building an international system of standard setting on human rights and in other areas:

Australia participates in international standard setting processes because it is in our National interests to do so. Nation-States (particularly states with a relatively small population such as Australia) benefits from a world where interaction between countries take place within a framework based on fair, agreed and transparent rules⁴.

Eroding human rights inevitably leads a country to becoming less civilised, more ignorant and less humane. There are many historical examples of countries that have embarked upon such a descent into brutality – especially on the justifications of protecting 'national sovereignty'. Weimar and Nazi Germany were premised on spurious notions of the primacy of national sovereignty and a disregard for human rights. The political philosopher Hannah Arendt described this trend in detail in her 1948 classic, The Origins of Totalitarianism. She describes for instance how the human rights of refugees were not regarded prior to the Second World War.⁵ She explains:

Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of "emigration,

⁴ Department of Foreign Affairs and Trade Submission No.93.vol.6 pp1168-69, cited in Senate Legal and Constitutional References Committee, 'Trick or Treaty? Commonwealth Power to Make and implement Treaties', November 1995, p.176.

naturalisation, nationality, and expulsion"; the point however, is that practical consideration and the silent acknowledgment of common interests restrained national sovereignty until the rise of totalitarian regimes...there was hardly a country left on the continent that did not pass between the two wars some new legislation which, even if it did not use this right extensively, was always phrased to allow for getting rid of a great number of its inhabitants [refugees] at any opportune moment.

Nationalism should never be placed before universal human rights standards as it embodies narrow, selfish sentiments that shut our minds and hearts to our common humanity. Parliamentarians would do well to remember this when asserting the primacy of our 'borders'. Arendt concluded that emphasis on the 'national interest' at the expense of protection and regard for human rights by the political leaders of the League of Nations in the twenties and thirties, meant that:

The transformation of the state from an instrument of the law into an instrument of the nation had been completed; the nation had conquered the state, national interest had priority over law long before Hitler could pronounce "the right is what is good for the German people." Here again the language of the mob was the only language of public opinion cleansed of hypocrisy and restraint.⁶

It is sometimes argued that we have an adequate system of protection and legal remedy through the courts. However, the case of the teenager cited above, shows that the law has done nothing to alleviate his suffering in two and a half years. We need to be alert to 'passive injustice' – indifference and a lack of empathy, which effectively endorses abuses occurring. Judith Shklar, Professor of Government at Harvard University explains that:

By passive injustice I do not mean our habitual indifference to the misery of others, but a far more limited and specifically civic failure to stop private and public acts of injustice. The possibility of such preventative civic activity is far greater in a free society than in a fear ridden and authoritarian ones. As

⁵ Hannah Arendt, The Origins of Totalitarianism, (Harcourt Brace) New York, 1976, pp.278-9.

⁶ Arendt, *ibid*, p.275.

*citizens we are passively unjust...when we silently accept laws that we regard as unjust, unwise, or cruel.*⁷

Adherence to international human rights norms are one guarantee against such passive injustice occurring.

The growth of international human rights treaties, UN reporting bodies for monitoring human rights, and human rights culture spearheaded by citizens' organisations such as Amnesty International, have been great social achievements of the last fifty years. It represents a tacit understanding internationally that in order to protect and promote respect for human rights, a modicum of sovereignty is voluntarily given up to participate in the international human rights system. The power of the human rights movement is as much moral as legal and governments begrudgingly acknowledge this and make attempts at respecting human rights.

A previous generation of politicians had few qualms about human rights. Liberal leaders such as Robert Menzies and Malcolm Fraser had a different approach to rights and saw them largely as fundamental tenets of Liberalism. Governments signed onto numerous human rights conventions, incorporated them into domestic law and established domestic monitoring bodies such as the Human Rights and Equal Opportunity Commission and state based Equal Opportunity Commissions and Anti Discrimination Boards. The Race Discrimination Act (1975) is based on the convention on the elimination of All forms of Racial Discrimination, the Sex Discrimination Act (1984) is based on the Convention on elimination of Discrimination Against Women, and we have state based statutory bodies created specifically to hear complaints about these rights although they need the power to initiate their own investigations in order to fully protect these rights in society. The Human Rights Commission Act (1981) and the Human Rights and Equal Opportunity Act (1986), created a watchdog body over the rights contained in the International Convention on Civil and Political Rights, the Convention on the Rights of the Child, the Declaration on the Rights of the Disabled, and the International Labor Organisation Convention on Discrimination in Employment.

⁷ Judith, N. Shklar, The Faces of Injustice, Yale, 1990, p.6. +

Cultural Relativism

Aside from outright rejection of human rights employed by some Governments, some argue that human rights are a specifically western concept and reject their applicability across cultures. However, the concept of a universally applicable standard of rights was explored by the fledgling UN body, the United Nations Economic Social and Cultural Organisation, UNESCO in 1947. UNESCO established a philosophers committee comprising leading representatives from different countries they constructed a survey receiving contributions from many cultural traditions including contributors from prominent thinkers of the time, including Gandhi, *Brave New World* author Aldous Huxley and French Jesuit Pierre Teilhard de Chardin.

Respondents from non-western backgrounds noted that the sources of human rights were present in their traditions, even though the language of human rights was a relatively modern European development. The final report explained:

Varied in cultures and built upon different institutions, the members of the United Nations have, nevertheless, certain great principles in common. They believe that men and women all over the world have the rights to live a life that is free from the haunting fear of poverty and insecurity.

What of Australian 'culture'? Australians like to evoke the concept of 'the fair go', a social justice concept. However, what is the difference between John Howard's concept of a fair go and Pauline Hanson's? Or Mark Latham's 'Third Way' version of social justice and that of the Catholic Church? Human Rights are the critical glue with which these fluid concepts can be reduced to a solid basis of fundamental principles. Human Rights represent universally accepted values and legal norms of behaviour. They are important because they are based on detailed international treaties voluntarily signed by our Government and in some cases incorporated into our law.

There are an internationally agreed set of standards and principles for protecting people's rights which the Australian people know that their Governments', at State and Federal level, can adhere to, and work towards implementing. Secondly there is an international framework of accountability, which ensure best practice in Australia for protection of people's rights and if there was an alleged violation, that was not investigated and dealt with at a national level, then there would be a means of international protection and oversight.

The challenge now is for Australians to understand that human rights are not something that apply only overseas. The plight of asylum seekers incarcerated without trial for four years, the claims of indigenous Australians for recognition of their right to self-determination, the rights of disabled people to have equal access to public transport, the call for protection of children under Federal or State based Children's Commissioners, and other practical issues, have brought human rights home to us.